88-737

No. 88-

Supreme Court, U.S.
FILED
NOV 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JEAN ELIZABETH MORGAN,
Petitioner,

v.

ERIC A. FORETICH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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November 3, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment prohibits the incarceration of a parent for civil contempt where the contempt hearing and related child visitation proceedings have been conducted largely in secret, and the trial court has failed to make specific findings adequate to support closure of the proceedings.

PARTIES

The appellant in the proceedings below was Dr. Jean Elizabeth Morgan. The appellee was her ex-husband, Dr. Eric A. Foretich. Their minor child, Hilary Foretich, was represented by a *guardian ad litem*, Linda P. Holman, Esquire.

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, Dr. Jean Elizabeth Morgan, respectfully prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals in this proceeding entered August 5, 1988.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals that is the subject of this petition is reported at 546 A.2d 407 (D.C. 1988) and reprinted in the Appendix at 1a-14a. Related opinions of the Court of Appeals are reported at 528 A.2d 425 (D.C. 1987) and 521 A.2d 248 (D.C. 1987) and reprinted in the Appendix at 15a-22a and 23a-34a, respectively.

JURISDICTION

The final judgment of the District of Columbia Court of Appeals was entered on August 5, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment V: [1]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This dispute began over six years ago when the petitioner, Dr. Jean Elizabeth Morgan, separated from her husband of seven months, Dr. Eric A. Foretich. It has resulted in Dr. Morgan being held in civil contempt and incarcerated for an indefinite period now exceeding fourteen months. Dr. Morgan has been denied a meaningful opportunity to publicize the full circumstances of her continued imprisonment—most importantly, the compelling reasons for her refusal to comply with the court's visitation order—because the trial judge has sealed the transcripts and records of virtually all proceedings, imposed a gag order on the parties, and closed the crucial portions of the contempt hearing to the public. Dr. Morgan thus remains in jail indefinitely as a result of civil contempt and related child visitation proceedings that have been conducted largely outside the public view.

This current state of affairs was produced by the following series of events and court decisions. Dr. Morgan

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[1] The due process safeguards of the Constitution are made applicable to the District of Columbia by the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

gave birth to her daughter, Hilary, in August 1982, shortly after she and Hilary's father, Dr. Foretich, were separated. Hilary thereafter lived with her mother. On November 8, 1984, then-presiding Judge Mencher of the Superior Court of the District of Columbia granted custody to Dr. Morgan, providing for alternating weekend visitations with Dr. Foretich. On that same date, Judge Mencher issued an order, at Dr. Foretich's request, excluding the press and public from the proceedings and sealing the record. App. at 39a-40a ("the closure order").

By November 1985, Dr. Morgan had accumulated evidence that she believed documented sexual abuse of Hilary by Dr. Foretich, and she sought a temporary restraining order suspending visitations by Dr. Foretich until such time as Hilary could be evaluated by medical and psychiatric experts.[2] After a hearing, Judge Dixon of the Superior Court found the evidence of sexual abuse to be inconclusive and he denied the motion to suspend visitation.

In February 1986, acting on the advice of her counsel and Hilary's therapist, Dr. Morgan stopped sending Hilary on weekend visitations. Dr. Foretich moved to hold Dr. Morgan in civil contempt. After a series of hearings held largely in closed session pursuant to the November 8, 1984 closure order, Judge Dixon found that Dr. Morgan had not proved sexual abuse by a preponderance of the evidence, and he held her in contempt for not sending Hilary on the court-ordered weekend visitations. Judge Dixon stayed his order of incarceration on the condition that Dr. Morgan produce Hilary for an indefinite visitation, and when she refused, he ordered her incarcerated on August 5, 1986.

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[2] Dr. Morgan's motion for a temporary restraining order was assigned to Judge Dixon of the Superior Court. Subsequently, on April 28, 1986, this case was assigned to Judge Dixon for all purposes.

At the August 5 civil contempt hearing, the attorneys for both parties sought clarification of whether the closure order prohibited out-of-court statements concerning the visitation and related contempt proceedings, and, if so, to what extent. Judge Dixon intimated that the intended scope of the closure order was broad, but he declined to rule formally on the requests for clarification. On August 11, 1986, Dr. Foretich asked the court to cite Dr. Morgan and her attorney for criminal contempt for statements allegedly made to the press after the civil contempt hearing. Dr. Morgan filed a similar motion with Judge Dixon on March 2, 1987, alleging that Dr. Foretich had also made out-of-court statements to the press.[3]

Dr. Morgan appealed the judgment of civil contempt, and on August 7, 1986 the District of Columbia Court of Appeals stayed Judge Dixon's order of incarceration pending appeal. On appeal, Dr. Morgan argued, *inter alia*, that Judge Dixon had violated her due process rights under the Fifth Amendment by denying her re-

[3] On July 7, 1987, Judge Dixon referred these contempt motions to the United States Attorney for the District of Columbia for possible prosecution; the United States Attorney in turn referred the motions to the General Litigation and Legal Advice Section of the Criminal Division of the Department of Justice. On September 20, 1988, the Department of Justice sent a letter to Judge Dixon informing him of its judgment that the cases lacked prosecutive merit and would not be pursued further. The letter explained that the November 8, 1984 closure order had—at the time of the alleged disclosures—been ambiguous with respect to whether it prohibited discussions of the civil contempt case with the public. The letter explained further that "[t]he scope of the restrictions were not defined for Dr. Morgan and her attorney at the August hearing despite counsel's statements that he did not understand the sealing orders as applicable." App. 75a. After receiving this letter, Judge Dixon issued an order directed to the parties inviting comment by November 4, 1988 on how the court should dispose of the criminal contempt motions, including whether the court should "exercise its inherent authority independent of the Department of Justice's decision." App. 63a-64a.

quest to open the August 5 civil contempt hearing to the public.

On November 26, 1986, prior to the Court of Appeals' decision on the Fifth Amendment issue, Judge Dixon issued an order denying the motion of the Washington Post to intervene for the purpose of asserting its First Amendment rights to attend the proceedings and to secure access to relevant pleadings and records. In that order, Judge Dixon took the opportunity to clarify that the November 8, 1984 closure order prohibited out-of-court-statements concerning the proceedings, including statements revealing Hilary's name, age, sex or address, and statements concerning "any specific act alleged to have been committed by or upon the child." The judge further explained that "[t]he most descriptive word which may be used [in the course of public disclosures] is 'abuse,' without reference to a particular kind of abuse such as physical, mental, psychological or sexual." App. 46a-47a.

The Court of Appeals released its opinion on Dr. Morgan's Fifth Amendment claim on February 6, 1987. The court found, based principally on this Court's decision in *In re Oliver*, 333 U.S. 257 (1948), that a defendant in a civil contempt proceeding "has a qualified [Fifth Amendment] right not to be incarcerated in a secret proceeding." App. 28a. The court went on to find, however, that the presumption of openness and the standard for closure that apply in criminal cases "do not apply to the evidentiary phase of a civil contempt hearing in a child custody and visitation rights case." App. 31a.[4] It never-

[4] In positing this rule, the Court of Appeals claimed to be writing on a "clean slate." App. 31a n.10. It noted that in *In re Oliver*, this Court had recognized the Fifth Amendment right of contemnors to a public trial in the context of grand jury inquiries, which historically have been *completely closed* to the public. It then suggested that neither this Court nor others had ever considered whether such a right obtained in the context of a proceeding (such as a child custody/visitation proceeding) *"other than one with a tradition of complete secrecy."* *Id.* (emphasis added).

theless remanded the closure issue to Judge Dixon for findings "specific enough for us to determine how he weighed the interests of appellant, appellee, and the child in the context of the qualified constitutional right of a civil contemnor to a public hearing that we recognize today." App. 33a.

A scant six days later, Judge Dixon issued findings reaffirming his previous decision to close the August 5 civil contempt hearing. Judge Dixon found that disclosure to the public of the sexual abuse allegations made by Dr. Morgan "would be embarrassing and damaging to the child and the child's reputation, now and in the future." App. 16a (quoting Judge Dixon's order). He also found that an open hearing would be unfair to Dr. Foretich. App. 17a n.2 (citing Judge Dixon's order). In an opinion issued on June 30, 1987, the Court of Appeals found these findings sufficient to warrant closure of the contempt hearing, reasoning that the need to safeguard the child's "best interest," standing alone, outweighed Dr. Morgan's qualified right to an open hearing. App. 17a.[5]

In the meantime, a four-day public trial was held in February 1987 in the United States District Court for the Eastern District of Virginia on Dr. Morgan's civil suit against Dr. Foretich for damages arising out of his alleged sexual abuse of Hilary, and Dr. Foretich's counterclaims alleging, *inter alia*, defamation of character. In this open trial, detailed evidence was presented concerning overt sexual acts allegedly perpetrated by Dr. Foretich.[6] This evidence detailing specific instances of

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[5] Between the time Judge Dixon found Dr. Morgan in contempt in August of 1986, and the time the Court of Appeals affirmed that order in June 1987, Judge Dixon held Dr. Morgan in contempt a second time for refusing to comply with further visitation orders. Dr. Morgan spent three days in jail on this second civil contempt finding from February 17, 1987 to February 19, 1987.

[6] Included in the Appendix are materials submitted by the Washington Post in connection with its motion to unseal the record in

sexual abuse is now part of the public record. On February 20, 1987, the jury found for Dr. Foretich on Dr. Morgan's claims and for Dr. Morgan on Dr. Foretich's counterclaims, and all claims were dismissed. The dismissal of Dr. Morgan's action was subsequently reversed by the Fourth Circuit on the grounds that Hilary's out-of-court statements describing sexual abuse by her father and evidence that Dr. Foretich also abused Hilary's half-sister had been improperly excluded. *See* p. 11 *infra*.

From February 1987 to August 1987, Judge Dixon was asked to reconsider the visitation/custody issue on several occasions. At each step of the way, Hilary's guardian urged Judge Dixon to appoint a multi-disciplinary team of neutral experts to evaluate Hilary's case and to suspend visitations until that evaluation was completed. Judge Dixon has repeatedly declined to follow that recommendation.

On April 13, 1987, Judge Dixon issued an order relieving the parties of certain disclosure restrictions imposed by his November 26, 1986 order. Specifically, he permitted the parties to mention Hilary's "name, age, sex and other biographical information, including identification of siblings," and to make reference to the terms "physical, mental, psychological, sexual or other types of abuse," in any discussions they might have with the press, media or general public. He reiterated, however, that the parties were prohibited from disclosing "any specific sex abuse allegation," either orally or through the release of documents. He further provided that "[p]rior to any reference in court to a specific sex abuse allegation, counsel shall discuss the matter at the bench so as to allow a determination if the hearing should be closed." App. 49a-50a.

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this case, including an affidavit of a Post reporter who attended the Virginia trial, and excerpts from the trial transcript. App. 121a-129a.

Between February and April 1987, Judge Dixon limited Dr. Foretich's visitations to brief, supervised periods. However, on April 21, 1987, without notice and hearing, he ordered unsupervised weekend visitations. On the very first weekend, Hilary reported being abused by her father, and subsequent weekend visits brought mounting evidence of sexual abuse.[7] Dr. Morgan and Hilary's guardian sought emergency stays in the Court of Appeals of several unsupervised weekend visits without success.

On August 19, 1987, Judge Dixon—finding that the evidence of sexual abuse was "in equipoise"—entered an order providing for an extended visitation from August 22 through September 6.[8] Dr. Morgan appealed this extension of Dr. Foretich's visitation rights, and again sought an emergency stay from the Court of Appeals, which was denied. When August 22 arrived, Dr. Morgan did not send her daughter on the extended visitation, based on her certainty that Dr. Foretich had sexually molested Hilary during previous visitations and advice from Hilary's therapist that a two-week unsupervised

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[7] Because the closure order remains in effect, petitioner has refrained from citing any evidence of specific acts of sexual abuse. That evidence, however, is reflected in the sealed transcripts and records, and consists of four types: (1) evidence that Dr. Foretich sexually abused his only other daughter; (2) physical evidence of sexual abuse of both Hilary and his other daughter; (3) psychiatric and psychologic evidence of abuse; and (4) evidence of Dr. Foretich's troubling psychological profile and history of violent behavior. The record also reflects the emotional trauma suffered by Hilary and the danger to her life and well-being brought about by her abuse. Transcript ("Tr.") at 136-57 (7/28/87) (testimony by Hilary's therapist that Hilary suffers from post-traumatic stress syndrome and that repeated threats to kill herself to avoid being with her father should be taken seriously).

[8] Judge Dixon's conclusion that the evidence of abuse was "in equipoise" appeared in his August 18 order refusing to stay an earlier weekend visitation, and was incorporated by reference in his August 19 order for extended visitation.

visitation "would be the ultimate destruction of Hilary." Tr. at 37 (8/26/87). Instead, she sent her daughter into hiding.

On August 24, 1987, Judge Dixon issued an order to show cause why Dr. Morgan should not be held in civil contempt, and set a trial date for August 26, 1987. In response, Dr. Morgan filed two motions; a motion requesting Judge Dixon to open the contempt hearing, unseal the record, and modify the closure order, and a motion requesting Judge Dixon to recuse himself from the contempt trial. In the former, Dr. Morgan argued, *inter alia*, (1) that the Fifth Amendment required the contempt hearing to be opened and the record unsealed so that the public could view the full circumstances of her noncompliance with the court's visitation order; and (2) that the asserted justification for closure—the need to protect Hilary's reputation—had faded as a consequence of the public disclosures in related proceedings. In the latter, Dr. Morgan alleged that Judge Dixon had decided from the outset of the proceedings that she had fabricated charges of sexual abuse and therefore had closed his mind to the ever-increasing evidence of abuse.[9]

Judge Dixon denied both motions.[10] In refusing to open the contempt hearing to the public, unseal the record, and modify the closure order, he merely reiterated his previous conclusion that disclosure of specific sex

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[9] Dr. Morgan further argued in support of her recusal motion (1) that closure of the courtroom during the contempt trial could do nothing but enhance Judge Dixon's ability to cling to his preconceived notions regarding the credibility of her allegations; and (2) that Judge Dixon had exhibited a desire to punish her.

[10] Judge Dixon did not issue his written findings and order denying Dr. Morgan's motion to open the hearing, unseal the record, and modify the closure order until *after* she had been held in contempt and incarcerated, and had filed an appeal challenging her incarceration on Fifth Amendment grounds. Accordingly, Dr. Morgan did not file a separate appeal once that written order was issued.

abuse allegations would damage Hilary's reputational interests.[11] He did not address Dr. Morgan's contention that such concerns had been largely mooted by developments in related proceedings.[12]

At the contempt hearing itself, Dr. Morgan testified that she had been justified in her refusal to comply with the court's extended visitation order because she was convinced to a moral certainty that compliance would result in the rape and emotional demise of her five-year-old daughter. Tr. at 35-44 (8/26/87). Judge Dixon permitted Dr. Morgan to present some evidence in support of her "necessity" defense (albeit in closed session), but at the conclusion of the hearing he brushed the defense aside as "disingenuous." *Id.* at 85. He then found Dr. Morgan in civil contempt and ordered that she be in-

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[11] Judge Dixon did open the civil contempt hearing for an exceedingly brief colloquy with Hilary's guardian, the closing arguments of counsel, and the announcement of his decision. Tr. at 71-93 (8/26/87). He also permitted the public to be present for a colloquy between himself and one of Dr. Morgan's attorneys on the issue whether he should admit the attorney *pro hac vice* (which he declined to do), and for the very beginning of Dr. Morgan's testimony. *Id.* at 3-14, 19-28. However, Judge Dixon ordered the courtroom closed as soon as Dr. Morgan began to recite the reason for her noncompliance with the court's extended visitation order—her firm, unshakeable and well-documented belief that Dr. Foretich had sexually abused Hilary. *Id.* at 28-71. Because Judge Dixon has also sealed the massive record of these proceedings, and imposed a gag order on the parties, the public has no basis for judging his competence and evenhandedness in evaluating Dr. Morgan's defense and committing her to indeterminate incarceration for civil contempt.

[12] In response to a Motion of the Washington Post To Intervene and for Access filed on March 23, 1988, Judge Dixon has unsealed the Superior Court clerk's record of docket entries, and promised to unseal the transcripts of those few proceedings that have been conducted in open court. App. 51a-62a. He has remained adamant, however, about his refusal to unseal the vast bulk of the record. *Id.*

carcerated until such time as she produced Hilary for the court-ordered visitation.

Dr. Morgan filed an appeal,[13] which was argued before a panel of the District of Columbia Court of Appeals on April 25, 1988.[14] Three weeks later, the United States Court of Appeals for the Fourth Circuit overturned the judgment dismissing Dr. Morgan's civil action for damages against Dr. Foretich, and remanded that portion of the case for further proceedings.[15] The Fourth Circuit held that the district court had erred both in excluding Hilary's out-of-court statements describing sexual abuse by her father and evidence that Dr. Foretich also abused Hilary's half-sister. App. 83a-98a. The court also found that the testimony of the doctors and other witnesses at trial was sufficient to justify a finding that Hilary had been sexually abused. App. 90a.

On August 5, 1988, the District of Columbia Court of Appeals issued its opinion denying all but one of the claims asserted by Dr. Morgan on appeal.[16] With respect to the closure issue, the court found that Judge Dixon had closed only a "limited" portion of the contempt hearing to the public, and that this "limited" clos-

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[13] Upon a motion by the Washington Post, the Court of Appeals ordered the appellate briefs to be redacted in conformity with the closure order, and then made available to the public. App. 35a. Otherwise, virtually all transcripts, pleadings, orders and records in these proceedings remain under seal.

[14] In the interim, Dr. Morgan sought a stay pending appeal in both the Court of Appeals and this Court, an expedited appeal, and an initial *en banc* hearing—all of which were denied.

[15] The Fourth Circuit affirmed the dismissal of Dr. Foretich's counterclaims. App. 98a-99a.

[16] The court upheld Dr. Morgan's contention that Judge Dixon had improperly ordered the forfeiture of a $200,000 bond.

ure did not violate the Constitution for the reasons set forth in its prior two opinions. App. 10a-11a.[17] The court declined to consider Dr. Morgan's contention that developments in the related federal action eliminated any conceivable justification for continued secrecy, *see* App. 106a, 115a, noting only that "[h]owever disclosures outside these proceedings and other developments may ultimately affect the issue of continued closure, we do not think the trial court erred in the limited closure of the contempt proceeding on appeal before us." App. 10a-11a.

The Court of Appeals gave equally short shrift to Dr. Morgan's argument that her noncompliance with Judge Dixon's extended visitation order was justified by her objectively reasonable belief that compliance would result in imminent and irreparable harm to her daughter. However, the court did not rely on Judge Dixon's conclusion that Dr. Morgan's assertion of this defense had somehow been "disingenuous." Rather, the court went further by holding that the defense of necessity was completely unavailable as a lawful defense to a civil contempt charge. The court opined that "[c]ivil contempt could become meaningless if a lawful defense could rest on the ground that a party took a different view, however reasonable, of the potential harm in compliance." App. 8a.

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[17] The court refused to consider the impact on Dr. Morgan's due process rights of "other aspects" of the closure order—including the restrictions on out-of-court statements and the sealing of the record—even though Dr. Morgan had filed a *single, pre-contempt hearing motion* with Judge Dixon to open the hearing, unseal the record, and modify the closure order, *see* note 10 *supra*, and even though Dr. Morgan had raised these "other" disclosure issues in her brief to the Court of Appeals, *see* App. 106a-107a, 119a-120a. Apparently, the court deemed it significant that Dr. Morgan appealed the contempt finding and accompanying order of incarceration before Judge Dixon issued his written order purporting to justify continued closure of these proceedings, and did not file a separate appeal once the written order was issued.

On August 30, 1988, the Court of Appeals denied Dr. Morgan's motion to stay the mandate pending application to this Court for a writ of certiorari. App. 37a-38a.[18]

REASONS FOR GRANTING THE WRIT

I. The closure order in this case violates Dr. Morgan's due process right not to be incarcerated in secret proceedings, and unduly restricts public debate in an area of increasing public importance and concern.

This is a shocking case. Dr. Morgan has presented overwhelming and largely uncontroverted evidence that Dr. Foretich has sexually abused his six-year-old daughter Hilary. Remarkably, Judge Dixon has concluded that this evidence of sexual abuse is merely "in equipoise," and, despite his own determination that there is thus a fifty percent chance that Dr. Foretich abused his child, has ordered an unsupervised, two-week visitation. The District of Columbia Court of Appeals has rubber-stamped Judge Dixon's factual findings and visitation order in what can only be characterized as a see-no-evil, hear-no-evil application of the abuse of discretion standard. Meanwhile, Dr. Morgan enters her fifteenth month in prison as a consequence of a contempt hearing and re-

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[18] On September 22, 1988, Dr. Morgan filed a habeas corpus petition in the Superior Court alleging that her continued incarceration on civil contempt charges has not and will not have its intended coercive effect, and that due process therefore requires that she be released. That case has been assigned to Judge Dixon, but has not yet been acted upon.

Dr. Morgan had previously filed a habeas corpus petition in the United States District Court for the District of Columbia, seeking release from incarceration on these same due process grounds. That petition was denied on the ground that the doctrine of comity required the due process issue to be raised in the state courts in the first instance.

lated child visitation proceedings that have been conducted largely outside the public view.

As shocking as this case is, it is but one of many arising with alarming frequency in this country. A study by The Association of Family & Conciliation Courts Research Unit estimates that sexual abuse charges are made in approximately two percent of contested custody and visitation cases,[19] and finds that judges are frequently relying on their civil contempt power in an effort to wrest obedience from parents who refuse to comply with visitation orders because they believe their children have been sexually abused. A recent article in Good Housekeeping magazine documents the case histories of nine women who have either been jailed or threatened with contempt for refusing to comply with visitation orders under such circumstances,[20] and these and other cases have attracted wide attention in both the print and broadcast media, as well as in professional circles.[21]

The public debate on this issue has centered largely on the capacity of the courts to deal appropriately with this

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[19] The study analyzes court data on child custody and visitation disputes in 12 states. It attributes the apparent rise in sexual abuse allegations in the 1980s to "greater public and professional awareness of sexual abuse and a greater willingness [on the part of parents] to disclose the problem," rather than to "an increase in the actual incidence of abuse or to a rash of false allegations designed to influence custody-visitation decisions." Association of Family & Conciliation Courts Research Unit, *Allegations of Sexual Abuse in Custody & Visitation Cases: An Empirical Study of 169 Cases From 12 States* 15-16 (March 1988).

[20] *See Mothers Who Go to Jail for Their Children*, Good Housekeeping, October 1988 at 158.

[21] In addition to the newspaper and magazine articles discussed herein and numerous other written accounts of these cases, there has also been extensive television coverage of the subject, including an October 16, 1988 "60 Minutes" report, a January 12, 1988 "Nightline" program and an April 6, 1988 Lifetime cable channel documentary entitled "Child Abuse: Innocence on Trial."

increasingly visible problem.[22] A Boston Globe article, for example, cites a six-year study at Harvard and Massachusetts General Hospital finding that courts disbelieved childrens' allegations of sexual abuse in approximately seventy-three percent of the cases studied, including one case in which a pediatrician documented the presence of semen in the child's vagina after a visit with her father.[23] Studies such as these have led many ex-

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[22] Examples of the difficult questions that have emerged from the judicial system's experience with sexual abuse allegations in the context of custody/visitation disputes include the following: Is it legitimate for a court not to hear from a child on grounds that she is too young to testify in the traditional sense? What is the appropriate role of experts and divorce courts in child sexual abuse proceedings? Who are the most qualified experts in child sexual abuse proceedings—classic Freudian child psychiatrists or psychologists and protective service workers who specialize in the field? Is a child's apparent affection for the alleged abuser evidence of the falsity of the charges, or is it analogous to the hostage's well-known psychological attachment to his captor? Can a very young child be coached to fabricate detailed accounts of sexual abuse, to exhibit the related behaviors and emotions, and to maintain the lie effectively? Are parents prone to fabricate sexual abuse charges to spite the non-custodial parent?

[23] The study included nineteen children age six or under who the researchers believed had been sexually abused by their non-custodial parent. In reaching the conclusion that these children had been abused, the researchers relied not only on the allegations of the children and/or their custodial parents, but also on evidence of physical and psychological symptoms such as premature sexualization, post-traumatic stress disorder, regression, infections and healed lacerations.

Other studies by the American Bar Association ("ABA") and the National Legal Resource Center ("NLRC") suggest that most child sexual abuse claims made in the context of custody/visitation proceedings are valid, and that deliberate falsifications of such charges are rare. *See Mothers on the Run*, U.S. News & World Report, June 13, 1988 at 22, 24 (citing ABA statistics); *Mothers on Trial*, The Washington Woman, Jul./Aug. 1987 at 16, 37 (citing the NLRC study); *see also* N.Y. Times, Nov. 14, 1987 at 1, 34 (citing conclusion of one expert that "[e]ven in custody disputes, the majority of sexual abuse allegations are true").

perts to conclude that the judicial system as presently constructed is ill-equipped to deal effectively with cases of alleged child sexual abuse, and that alternatives to judicial decision-making in these cases must be explored.[24]

Serious questions have likewise been raised about the judicial system's and society's treatment of parents who have acted on a reasonable, good faith belief that compliance with a visitation order would imperil the lives of their children. As judges have increasingly relied on their civil contempt power in these circumstances, desperate parents have begun to search for alternatives of their own. A great many have taken their children and disappeared into what has been termed the "new underground railroad"—a network of volunteers across the country that offers refuge to parents who have lost faith in the willingness and ability of the judicial system to protect their children from sexual abuse.[25] Others, like Dr. Morgan, have chosen to stay and defend themselves against charges of contempt, arguing that no compassionate and rational system of justice can compel a parent

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[24] *See, e.g.*, Boston Globe, Nov. 27, 1987 (citing conclusion of study author that "the court system should be changed so that child protection agencies take precedence over the divorce courts"); *Mothers on the Run*, at 24 (quoting experts who believe that judges find it difficult to credit allegations of sexual abuse, even in the face of clear medical evidence of abuse); N.Y. Times, Nov. 14, 1987 (quoting experts who believe that divorce courts are inherently unsuited to the task of protecting children from sexual abuse by a parent, and citing the growing debate over which institutions are best qualified to evaluate charges of sexual abuse); Washington Post, Apr. 6, 1988 at B4, col. 1 (reviewing the cable documentary "Child Abuse: Innocence on Trial," and concluding that the central message of the program was "that in handling the problem of sexual abuse as it relates to divorce and custody, the system isn't working. Neither the medical system, the social service system nor the legal system. Especially the legal—read, judicial—system").

[25] *See Mothers on the Run*, at 22.

—under pain of imprisonment—to act in a manner that she reasonably believes would destroy the life or mental health of her child.[26] Whether society is prepared to recognize such parental responses, and, if not, what alternatives are available to these parents, are questions of intense public debate and urgency.[27]

The closure order imposed in these proceedings has prevented Dr. Morgan's case from forming a meaningful part of this emerging public debate. To be sure, the case has attracted tremendous media attention and public interest, and there have been disclosures of some evidence of sexual abuse in related proceedings. Because of the closure order, however, the public has been given only a very general sense of how this case has proceeded and been disposed of by the District of Columbia courts—*e.g.*,

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[26] This so-called "necessity" defense has been raised in an increasing number of contempt cases involving allegations of sexual abuse. *See, e.g., Crabtree v. Crabtree*, 716 S.W.2d 923, 925-26 (Tenn. Ct. App. 1986) (recognizing defense); *Beckham v. O'Brien*, 176 Ga. App. 518, 336 S.E.2d 375, 378 (1985) (recognizing defense); *Cox v. Cox*, No. CA-6912 (Ohio Ct. App. Dec. 15, 1986) (recognizing defense); *Morgan v. Foretich*, App. 8a-9a (rejecting defense); *A.G. v. R.M.D.*, 730 S.W.2d 543, 546 (Mo. 1987) (en banc) (rejecting defense); *see also Davis v. Davis*, No. 86 CA 16 (Ohio Ct. App. Apr. 7, 1987) (recognizing discretion of trial court not to hold father in contempt where father had demonstrated sincere concern that compliance with visitation order would subject son to possible sexual abuse); L.A. Times, May 13, 1987 (citing case in which woman accused of "child-stealing" was permitted to submit evidence to jury that would support "necessity" defense).

As the above cases suggest, no consensus has yet emerged on this issue.

[27] *See, e.g., Mothers on the Run*, at 22 (noting that "[t]he new underground railroad presents daunting legal and ethical dilemmas"); *Mothers Who Go to Jail for Their Children* (discussing the dilemma of women forced to choose between subjecting their children to serious harm and breaking the law); Washington Post, Aug. 28, 1988 at C1 (noting that women are increasingly opting to flee with their children rather than attempt to defend their actions in a contempt hearing).

the bare fact of Dr. Morgan's allegations, Dr. Foretich's denials thereof, Judge Dixon's finding that Dr. Morgan had failed to prove sexual abuse by a preponderance of the evidence, the judge's incarceration of Dr. Morgan for civil contempt, and the Court of Appeals' affirmance. It has been denied access to the crucial information it needs —*the actual evidence of sexual abuse and the manner in which that evidence has been presented, argued, received (or excluded) and evaluated*—to form an intelligent judgment on the reasonableness of Dr. Morgan's noncompliance with the court's visitation order, the competence and fairness of the presiding judges, and the general competence of the courts as arbiters of child custody and visitation cases involving allegations of sexual abuse. The imprisonment of Dr. Morgan under these circumstances is inconsistent with the precedents of this Court and with notions of fundamental fairness, which require that a person deprived of her liberty be afforded the opportunity to expose the judicial process resulting in her incarceration to meaningful public scrutiny.

The most relevant precedent of this Court is *In re Oliver*, 333 U.S. 257 (1948). There, the presiding judge found the defendant in contempt for refusing to answer grand jury questions and, in a secret proceeding, ordered him incarcerated for sixty days or until such time as he answered the grand jury's questions. This Court reversed, holding, *inter alia*, that due process prohibited a court from depriving an accused contemnor of his liberty in proceedings isolated from public view.[28] In so holding,

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[28] Under Michigan law, the contempt proceedings at issue were characterized as "criminal," even though the defendant was entitled to purge himself of contempt by complying with the court's order—a typical feature of "civil" contempt. This Court explicitly held, however, that Michigan's characterization of the contempt proceedings was immaterial in resolving the due process question. 333 U.S. at 266 n.13. The key element for the Court, and the trigger for due process protection, was the deprivation of liberty suffered by the contemnor. *Id.* at 273. *See also In re Rosahn*, 671

the Court traced this country's "historic distrust" of secret proceedings, emphasizing that the public trial guarantee served as an effective constraint on the possible abuse of judicial power, and quoting Jeremy Bentham for the proposition that "[w]ithout publicity, all other checks [on judicial power] are insufficient: in comparison of publicity, all other checks are of small amount." *Id.* at 266-72.

This Court's latest pronouncement on the public trial guarantee came in *Waller v. Georgia*, 467 U.S. 39 (1984), in the context of a criminal defendant's claim that closure of a suppression hearing violated his Sixth Amendment right to a public trial. The Court, quoting *In re Oliver*, reiterated the importance of the public trial guarantee and its capacity for deterring possible judicial abuse. *Id.* at 46. Borrowing from its First Amendment jurisprudence, the Court held that criminal trials and related suppression hearings were subject to a "presumption of openness" that could be overcome

> only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 45 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). The Court also held that a defendant need not prove prejudice in order to obtain relief for a violation of the public-trial guarantee. *Id.* at 49-50.

Judge Dixon's decision to close the crucial portions of Dr. Morgan's contempt hearing, seal the record of the proceedings and impose a gag order on the parties, and the Court of Appeals' affirmance of Dr. Morgan's incar-

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F.2d 690 (2d Cir. 1982) (applying *In re Oliver* to "civil" contempt proceedings resulting in incarceration).

ceration under these circumstances, cannot be justified under this Court's precedents. Moreover, they set a dangerous precedent of their own in an area of law where public debate desperately needs to be encouraged, not suppressed. For these reasons, the Court should grant this petition for certiorari and reverse the judgment below.

The District of Columbia Court of Appeals, relying on *In re Oliver*, recognized that a civil contemnor has a due process right to a public trial. However, the court went on to eviscerate this right substantially by concluding that a "presumption of openness" does not attach if the contempt hearing arises in the context of child custody/visitation proceedings. The Court distinguished *In re Oliver* as a case in which the contempt arose in the context of grand jury proceedings—which have a tradition of complete secrecy—and asserted that it was writing on a "clean slate" in deciding the extent to which *In re Oliver* applied to cases *without* such a tradition.

The rationale offered by the Court of Appeals for dispensing with the "presumption of openness" in contempt cases arising out of child custody/visitation proceedings is, frankly, bizarre. Because the due process right to a public trial applies even where the contempt arises in the context of proceedings with a tradition of *total* secrecy, *In re Oliver*, it *a fortiorari* applies where the contempt arises in the context of proceedings that do *not* have such a tradition. More fundamentally, this Court's precedents provide no basis for lumping together an entire class of cases for purposes of defining a defendant's Sixth Amendment or due process right to a public trial.[29] The basic

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[29] In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), this Court struck down on First Amendment grounds a Massachusetts statute that required judges to exclude the press and general public from the courtroom during the testimony of minor victims in sex-offense trials. In so holding, the Court rejected Massachusetts' attempt to identify a generic class of cases

right to a public trial cannot be overcome by mere invocation of the fact that certain proceedings typically involve sensitive or disturbing subject matter. It may, as this Court has held, be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller*, 467 U.S. at 45 (quoting *Press-Enterprise*, 464 U.S. at 510).[30]

The courts below failed to heed this Court's admonition that the right to a public trial may not be cavalierly balanced away, and, in the process, displayed a remarkable insensitivity to the core purposes of the public trial right. Dr. Morgan argued below that the principal functions of the right—to curb possible abuses of judicial power and to promote informed discussion of public affairs—were especially relevant in this case—the former because a powerful recusal motion had been lodged against Judge Dixon, *see* n.9 *supra* and accompanying text;[31] the latter

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in which closure would be required. It insisted instead on a "case-by-case" analysis in which the particular circumstances of each case would be carefully considered in determining whether there existed sufficiently weighty state interests to overcome the presumption of openness. 457 U.S. at 608.

[30] The Court in *Waller* found that appropriate circumstances for limiting a defendant's constitutional right to a public trial "will be rare," and cautioned that lower courts must balance countervailing rights and interests "with special care." *Waller*, 467 U.S. at 45.

[31] In *In re Oliver*, this Court recognized that improper judicial motives flourish in secrecy, and that it is the purpose of public trials to inhibit them:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

333 U.S. at 270 (footnotes omitted). *See also Applications of National Broadcasting Co.*, 828 F.2d 340, 345 (6th Cir. 1987)

because the capacity of courts to deal with allegations of sexual abuse and the response of parents to the failings of the judicial system are issues of extreme public importance and concern. *Neither* of these points were acknowledged or discussed by Judge Dixon or the Court of Appeals.[32]

While reducing Dr. Morgan's right not to be deprived of her liberty without due process of law to a mere token, the District of Columbia Court of Appeals accepted uncritically Judge Dixon's speculation that disclosure of evidence of sexual abuse would be "embarrassing and damaging to the child and the child's reputation, now and in the future."[33] Such speculative, inchoate reputa-

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(holding that the First Amendment required proceedings and records relating to a motion for recusal in a criminal trial to be open to the public, because, *inter alia*, "[w]hen a judge's impartiality is being questioned, it strengthens the judicial process for the public to be informed of how the issue is approached and decided").

[32] The Court of Appeals' insensitivity to Dr. Morgan's public trial right is further suggested by its casual—and misleading—characterization of Judge Dixon's closure of the contempt proceedings as "limited." App. 11a. As noted earlier, *see* n.11 *supra*, Judge Dixon closed the critical portion of the contempt hearing in which Dr. Morgan testified to her reasons for not complying with the extended visitation order. Moreover, he applied the closure order not only to the contempt hearing itself, but to the transcripts and records of related proceedings, and to the parties' out-of-court statements. The degree to which Judge Dixon has suppressed information needed by the public to assess intelligently the judicial response to this case cannot fairly be characterized and dismissed as "limited." He effectively blocked Dr. Morgan's defense from public view.

[33] Judge Dixon's extreme solicitude for the inchoate reputational interests of Hilary is difficult to reconcile with his decision—over the repeated objections of Hilary's guardian and the urgent pleas of Hilary's mother—to order an unsupervised, two-week visitation after finding that the evidence of sexual abuse was "in equipoise," and that there was thus a fifty percent chance that Hilary had been sexually abused by her father.

tional interests are plainly insufficient under this Court's precedents to override a defendant's liberty interests.[34] This is particularly the case where, as here, a significant amount of the evidence that might prove embarrassing to Hilary has been disclosed in other proceedings.[35] Again, these arguments were raised in the courts below and were ignored—the Court of Appeals going so far as to suggest that Dr. Morgan would have to remain in jail

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[34] In *Globe Newspaper*, this Court found that a state's asserted interest in protecting a minor victim of sexual abuse from the direct and immediate "trauma and embarrassment" of testifying in the presence of the public and press might, under the circumstances of a particular case, justify closure of the courtroom during the victim's testimony. 457 U.S. at 607; *see also State v. Workman*, 14 Ohio App. 3d 385, 471 N.E.2d 853, 859-60 (1984) (relying on *Globe* to justify closure during the testimony of two child rape victims who were considerably nervous about testifying). Hilary has not testified in any of these proceedings, and we are aware of no case in which a court has relied on *Globe* to justify closure to protect the interests of a nontestifying person.

Globe, moreover, involved the First Amendment rights of the public and press. State interests that might sometimes be sufficient to overcome First Amendment interests should not necessarily be deemed adequate to override a defendant's liberty interests. *Cf. Waller*, 467 U.S. at 46 ("[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and '[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.' ") (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

[35] This Court has observed that "interests in privacy fade when the information involved already appears on the public record," particularly where the asserted privacy interests are juxtaposed against rights protected by the Constitution. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975); *cf. Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (state interest in protecting the anonymity of a juvenile offender held insufficient to overcome the First Amendment right of a newspaper to publish the offender's name where the name was already in the public domain).

for an additional, indefinite period before she would be entitled to argue that disclosures in other proceedings undermined any conceivable justification that might once have existed for closure.[36]

In sum, the District of Columbia courts have misapplied this Court's precedents and established a dangerous precedent of their own in an area of law that can little afford doctrinal confusion. The mischief wrought by the courts' decisions, however, extends far beyond the warping of abstract legal principles. Those decisions have permitted Judge Dixon—whose openmindedness and impartiality have been seriously questioned—to jail Dr. Morgan for a period now exceeding fourteen months without having to consider that his actions would be subject to meaningful review in the forum of public opinion.[37] They have also established a precedent allowing judges to insulate themselves from meaningful public scrutiny in an area where questions of judicial competence, parental judgment, and the safety and health of children are increasingly being raised. If this dangerous precedent is not overturned, judges forced to make critical and controversial decisions in this area will likely be tempted to choose secrecy over vigorous public

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[36] *See* App. 10a-11a ("However disclosures outside these proceedings and other developments may ultimately affect the issue of continued closure, we do not think the trial court erred in the limited closure of the contempt proceeding on appeal before us."). Dr. Morgan raised this argument before Judge Dixon (who likewise ignored it) prior to the contempt hearing, *see* pp. 9-10 *supra*, and thus could not have been deemed to have waived it on appeal.

[37] Whether Judge Dixon would have decided this case differently had he been required to open the contempt hearing and unseal the record is unknown and unknowable. However, this Court has held that defendants need not prove prejudice in order to obtain relief for a violation of the public-trial guarantee. *Waller*, 467 U.S. at 49. A requirement that defendants establish prejudice would make vindication of the right virtually impossible, because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance." *Id.* at 49 n.9.

debate.[38] This Court should grant the petition for certiorari and reverse the judgment of the Court of Appeals, both to halt the continuing constitutional violation to which Dr. Morgan has fallen victim, and to affirm that the right to a public trial extends to defendants who are being jailed in increasing numbers by judges struggling to deal with the elusive societal problem of child sexual abuse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 3, 1988

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[38] To our knowledge, there are no statistics indicating the frequency to which judges have resorted to closure in this context. However, in at least one of the more celebrated cases that resulted in the imprisonment of a parent for seven months, it appears that the proceedings were conducted largely in secret, and that the parties were barred from discussing the case with the media. *See Trial Begins in Highly Publicized Tug-of-War Over 9-Year Old Girl*, Associated Press, May 2, 1988.